# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1164

RICHARD A. YAHR, ET AL., PETITIONERS

*v.*

STANLEY R. RESOR, SECRETARY OF THE ARMY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24–26) is reported at 431 F. 2d 690. The order of the district court denying petitioners' motion for a preliminary injunction (Pet. App. 27–32) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 27, 1970. By order of Mr. Justice Harlan dated November 17, 1970, the time for filing a petition for a writ of certiorari was extended to and including December 24, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



417-526—71

## QUESTION PRESENTED

Whether the district court acted within the proper scope of its discretion in refusing to issue a preliminary injunction prohibiting the Army from barring the distribution on the Fort Bragg Military Reservation of a newspaper published by soldiers.

## STATEMENT

Petitioners, servicemen stationed at Fort Bragg, North Carolina, sought permission on several occasions to distribute a newspaper they published, known as "Bragg Briefs." Permission was denied by the Commanding General of Fort Bragg.

Army Regulation AR 210–10, Par. 5–5, provides that:

> * * * [I]nstallation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

Where a publication does "present a clear danger to the loyalty, discipline, or morale of troops at his installation," the regulation authorizes an installation commander to delay its dissemination on the base (App. 29). The regulation also permits him to require prior approval of any distribution on base other than at regularly established and approved

outlets (App. 30). Such prior approval is required on Fort Bragg. Fort Bragg Regulation 210–23 (App. 30).

The Commanding General of the XVIII Airborne Corps and of Fort Bragg, Gen. Tolson, refused to permit distribution of Bragg Briefs. This action was then brought. In opposition to plaintiffs' motion for a preliminary injunction, the government submitted an affidavit of Gen. Tolson, in which he stated that in denying permission for the distribution of Bragg Briefs,

> * * * I considered the fact that one of the primary missions of Fort Bragg is to prepare individuals and units for assignment to South Viet Nam and that the "Bragg Briefs" considered were directed specifically to Ft. Bragg soldiers with the express purpose of encouraging them to organize in opposition to the war in Viet Nam. After review, and upon reflection it was, and is, my opinion that permission to distribute the four copies of "Bragg Briefs" should be denied because their contents constitute a clear danger to the loyalty, discipline and morale of the military personnel of my command.

The district court refused to grant a preliminary injunction, concluding that "the evidence fails to show a probability of plaintiffs' ultimate success on the merits, nor does it clearly establish that plaintiffs are being denied a constitutional right" (App. 31).

The court of appeals affirmed the denial of a preliminary injunction and remanded the case for further proceedings. The court stated (App. 26):

Constitutional questions should be decided only when unavoidable, and this is particularly true when the issue is raised on appeal from an interlocutory order. When the case is heard on the merits, the parties should brief, and the district judge should decide, the appropriate standard of review of the Commanding General's decision. The district court should also find which articles, specifically, constituted a basis for the decision to exclude and why the Commanding General deemed them "a clear danger to the loyalty, discipline and morale" of the military personnel at Fort Bragg. Only upon a complete record supplying these facts can it be determined whether the Commanding General had a proper basis for denying the applications, whether he acted consistently with Army directives, and, ultimately, whether his actions deprived appellants of their First Amendment rights.

## ARGUMENT

The present interlocutory posture of this case makes it an inappropriate vehicle for a ruling on the constitutional questions petitioners raise. See also the government's opposition to the petition in *Dash v. Resor*, No. 1163, this Term. Neither the district court nor the court of appeals has finally ruled on the legality of the Army's action; and the "complete record" which the court of appeals has required to be developed on remand should provide a more com-

plete background for such a ruling. For now, the questions petitioners seek to raise are premature.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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